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Opinion following transfer from Supreme Court

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ISAAC GARCIA,<br><br>Defendant and Appellant. | B266328<br><br>(Los Angeles County Super. Ct. No. VA128373) |

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Torribio, Judge. Affirmed, as modified.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Yun K. Lee and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

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In 2016, Isaac Garcia (defendant) appealed his convictions for two counts of attempted premeditated murder and one count of robbery. In an opinion issued in November 2016, we affirmed his convictions but vacated two of the enhancements, resulting in a reduced sentence of 65 years to life in prison. Defendant petitioned our Supreme Court for review. While his petition was pending, our Legislature enacted Senate Bill No. 1437 (S.B. 1437), which "amend[s] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder" (Stats. 2018, ch. 1015, § 1, subd. (f)). Our Supreme Court remanded the matter to us for further consideration in light of S.B. 1437. We solicited supplemental briefing on the issue. We conclude that the impact of S.B. 1437 on defendant's convictions and sentence must be assessed by the trial court in the first instance. Accordingly, we issue this revised opinion addressing all of defendant's arguments (including his S.B. 1437-related arguments, in the newly added section I.D in the Discussion section), and adhering to our prior disposition.

## FACTS AND PROCEDURAL BACKGROUND

### I. Facts

Defendant, Israel Itehua (Itehua) and Jeremy Harris (Harris) are all members of the Bellflower Devils clique of the 18th Street gang.

In November 2012, the three men saw a man they thought was a rival gang member in their clique's "gang territory" and followed him into an apartment complex. As they approached the complex, Itehua pulled out a gun. Their quarry ran into an apartment, and two women standing outside that apartment told the men, "There's kids here." Defendant told one of the women, "I don't give a fuck, bitch. This is fucking 18th Street"; he then

punched her in the face. Seconds later, Itehua shot the other woman in the neck, paralyzing her from the chest down. The three then turned to run away. As they left the complex, Itehua shouted, "18th Street," and fired four shots into a homeless man who had earlier refused to state any gang affiliation.

A month later, defendant walked into a Rite Aid, stuffed a bottle of alcohol beneath his sweatshirt, walked out the door without paying for it and punched the female loss prevention officer who tried to stop him.

## II. Procedural History

The People charged defendant with (1) the attempted murder of the woman Itehua shot (Pen. Code, §§ 187, subd. (a) & 664),[1] (2) the attempted murder of the homeless man (§§ 187, subd. (a) & 664), and (3) robbery (§ 211).[2] The People further alleged that all three crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22); that both attempted murders were committed willfully, deliberately and with premeditation (§ 664, subd. (a)); that a principal discharged a firearm in the course of each attempted murder (§ 12022.53, subd. (d)); and that defendant personally inflicted great bodily injury in the course of each attempted murder (§ 12022.7, subd. (b)).

A jury convicted defendant of all three crimes and found all

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 Itehua and Harris were also charged with the two attempted murders. We previously affirmed Itehua's conviction and sentence. (*People v. Itehua* (June 30, 2016, B265575) [nonpub. opn.].)

further allegations to be true.

The trial court sentenced defendant to a prison term of 68 years and four months to life. The court imposed a sentence of 32 years to life for each attempted murder, comprised of 7 years to life for the attempted murder plus 25 years for the discharge of a firearm allegation. The court imposed a sentence of four years and four months for the robbery, compromised of one year for the robbery (one-third the midterm of three years) plus three years and four months for the gang allegation (one-third the 10-year enhancement for that allegation). The court ran all three terms consecutively.

Defendant filed a timely appeal.

## DISCUSSION

### I. Attempted Murder Convictions

The trial court instructed the jury that it could convict defendant of the attempted murders committed by Itehua if it found that (1) defendant had aided and abetted Itehua and Harris in committing the crimes of battery or disturbing the peace (by approaching the rival gang member), and (2) the attempted murders were a natural and probable consequence of those crimes.

On appeal, defendant argues that his attempted murder convictions are defective because (1) there is insufficient evidence that the attempted murder of the woman and the homeless man were a natural and probable consequence of committing battery or disturbing the peace against the rival gang member, (2) the trial court erred in instructing the jury it could find attempted murder to be a natural and probable consequence of those lesser crimes, (3) the trial court erred in not requiring the jury to find that defendant personally acted with premeditation, which

violates *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*) and precludes the imposition a life sentence under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and (4) the trial court erred in responding to a jury note seeking an "enlarge[ment]" of the standard instruction on the natural and probable consequences doctrine. On remand from the Supreme Court, defendant argues that he is entitled to have his attempted murder convictions vacated in light of S.B. 1437.

***A. Sufficiency of the evidence***

A person is liable for a crime if he commits the crime himself or if he aids and abets another in its commission. (§ 31.) A person is liable as an aider and abettor if (1) he knows of the actual perpetrator's unlawful purpose, (2) he, by his act or advice, aids, promotes, encourages or instigates the actual perpetrator's commission of the crime, and (3) he acts with the intent or purpose to commit, encourage or facilitate the actual perpetrator's commission of the crime. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118; *People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*); *People v. Beeman* (1984) 35 Cal.3d 547, 561.) When a person aids and abets a crime, he must have the same intent as the actual perpetrator. (*McCoy*, at p. 1118 & fn. 1; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1054.)

An aider and abettor is guilty not only of the crime he intends to aid and abet, "but also of any other crime the perpetrator actually commits . . . that is a natural and probable consequences of the intended crime." (*People v. Rangel* (2016) 62 Cal.4th 1192, 1228-1229 (*Rangel*); *Prettyman*, *supra*, 14 Cal.4th at p. 254.) Before criminal liability will attach for a further crime beyond the intended crime, the People must prove (1) that the defendant aided and abetted the intended crime, and (2) the

further crime "was a natural and probable consequence of the [intended crime] that the defendant aided and abetted." (*Prettyman*, at pp. 261-262.) In assessing the second element, courts ask: Would a reasonable person in the defendant's circumstances recognize that the further crime was a reasonably foreseeable consequence of the crime the defendant intended to aid and abet? (*Chiu*, *supra*, 59 Cal.4th at p. 165; *People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*); *People v. Gonzales* (2001) 87 Cal.App.4th 1, 9-10 (*Gonzales*); *People v. Woods* (1992) 8 Cal.App.4th 1570, 1587.) For these purposes, it is enough if the further crime is a """possible consequence which might reasonably have been contemplated.""" (*Medina*, at p. 920.) The further crime """need not have been a strong probability.""" (*Ibid.*) Under these standards, it does not matter "'whether the aider and abettor *actually* [subjectively] foresaw the [further] crime.'" (*Ibid.*; *Gonzales*, at p. 9.)

Defendant argues that there is insufficient evidence that a reasonable person in his situation would recognize that the attempted murder of a *bystander* (such as the woman outside the apartment or the homeless man) might be a natural and probable consequence of a battery or confrontation that disturbs the peace against a *rival gang member*. In evaluating this sufficiency challenge, we ask whether there was "substantial evidence"—namely, evidence that is reasonable, credible and of solid value—to support the jury's finding. (*People v. Banks* (2014) 59 Cal.4th 1113, 1156 (*Banks*), overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391.) In so doing, we view the evidence in the light most favorable to the jury's finding and draw all reasonable inferences to support that finding. (*Ibid.*)

We conclude that the evidence was sufficient to support the

jury's finding that Itehua's attempted murders of the woman and the homeless man were a natural and probable consequence of the confrontation with the rival gang member that defendant intended to aid and abet. The People's gang expert testified that a gang member who is "disrespected" by someone who gets in his way is "expected . . . not to back down" and instead to "commit an act of violence" in response to such defiance. Defendant and his cohorts did precisely that. Defendant himself did not hesitate before confronting, cussing out, and punching one of the two women outside the apartment when, as he later explained, she "disrespected" him by telling him that children were inside the apartment, and Itehua did not hesitate before shooting the other woman or shooting the homeless man who refused to respond to their gang challenge. It is well within a jury's province to find that a reasonable person would foresee that murder is a natural and probable consequence of a gang-related assault or fistfight. (E.g, *Medina*, *supra*, 46 Cal.4th at p. 922 [so holding]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376 (*Olguin*) [same]; *People v. Godinez* (1992) 2 Cal.App.4th 492, 499-500 (*Godinez*) [same]; *People v. Montano* (1979) 96 Cal.App.3d 221, 226-227 (*Montano*) [same]; see generally *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1449-1450 [collecting cases].) Accordingly, there was ample evidence from which a jury could reasonably conclude that defendant and Itehua would commit violence, which could escalate to murder, against anyone whom they viewed as "disrespecting" them as they pursued the gang rival.

Defendant raises four objections to this analysis.

First, he argues that a gang expert's testimony is insufficient by itself to support a jury's finding as to what is a natural and probable consequence. We need not plumb the

correctness of this assertion because the jury's finding in this case also rested on defendant's own words and actions.

Second, defendant contends that the cases cited above—*Medina*, *Olguin*, *Godinez* and *Montano*—involved escalating gang violence against a gang rival, not a bystander. This is true, but these cases did not purport to limit their reasoning to gang rivals. Because the People in this case also presented evidence that gang members will violently confront not only gang rivals, but also any bystander who disrespects them, these cases remain relevant.

Third, defendant cites several cases that, in his view, dictate a contrary conclusion. However, most of those cases are distinguishable on their facts. (See *U.S. v. Andrews* (9th Cir. 1996) 75 F.3d 552, 556 [in non-gang context, no aiding and abetting liability when cohort "acted impulsively" in shooting a bystander]; *State ex rel. Juvenile Dep't of Multnomah County v. Holloway* (1990) 102 Or. App. 553, 556-558 [795 P.2d 589] [in gang case, no aiding and abetting liability when defendant was one of nine people in the back of a truck from which shots were fired at gang rivals]; *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, 1276-1279 [in gang context, no aiding and abetting liability when defendant was simply standing next to person who shot at gang rivals]; *U.S. v. Pena* (6th Cir. 1993) 983 F.2d 71, 71-72 [no aiding and abetting liability when defendant was passenger in a car carrying drugs secreted in trunk]; *Pinell v. Superior Court* (1965) 232 Cal.App.2d 284, 288 [no aiding and abetting liability when defendant helped woman sexually assaulted by his nephew and others].) The other cases defendant cites are irrelevant. (See *People v. Moore* (2011) 51 Cal.4th 386, 406 [expert testimony that blood found in a room "could have" come from defendant being present in that room too speculative]; *People v. Markus* (1978) 82

Cal.App.3d 477, 481-482 [setting forth intent requirement for aiding and abetting that was subsequently overruled in *People v. Montoya* (1994) 7 Cal.4th 1027, 1040].)

Lastly, defendant points out that he told the police in his post-arrest interview that he did not know Itehua was carrying a gun. Defendant's argument in this regard fails factually and legally. Factually, defendant's denial of knowledge conflicts with other testimony at trial that Itehua pulled out the gun before entering the complex in a manner that could be observed by others. The jury resolved that conflict against defendant, and we cannot gainsay that determination on appeal. (*People v. Armstrong* (2016) 1 Cal.5th 432, 451 ["a reviewing court does not *reweigh* the evidence"].) Legally, in the gang context, it is "not necessary for . . . a gang member to have known a fellow gang member was in fact armed." (*Medina*, *supra*, 46 Cal.4th at p. 924; see also *People v. Montes* (1999) 74 Cal.App.4th 1050, 1056 (*Montes*) [so holding].)

***B. Instructional errors***

We independently review whether the trial court properly instructed the jury. (*People v. Olivas* (2016) 248 Cal.App.4th 758, 772.)

*1. Use of battery and disturbing the peace as intended crimes*

As explained above, a jury may find a defendant criminally liable not only for the crime he intends to aid and abet a perpetrator in committing, but also for "any other crime the perpetrator actually commits . . . that is a natural and probable consequence of the intended crime." (*Rangel*, *supra*, 62 Cal.4th at pp. 1228-1229.) Defendant argues that the trial court erred in instructing the jury that he could be held liable for attempted murder on the basis of the intended crimes of battery and

disturbing the peace because (1) those intended crimes cannot, as a matter of law, naturally and probably lead to the attempted murder of bystanders, (2) there is not a "close connection" between the intended crimes and the attempted murder of bystanders, and (3) the intended crimes are too "trivial."

Defendant's first argument appears to be a more extreme version of his sufficiency-of-the-evidence challenge—namely, that in *no* case can the evidence establish that the attempted murder of a bystander is a natural and probable consequence of a confrontation of a gang rival that disturbs the peace or amounts to a battery. Because, as explained above, we conclude that the evidence in this case is sufficient to support the jury's finding of the requisite link, we necessarily reject defendant's more extreme position that a jury can never so find. Defendant seems to suggest that our analysis of the sufficiency of the evidence in this case does not resolve the matter because we must, when evaluating his more global attack, view the evidence in the light most favorable to him rather than in the light most favorable to the jury's finding. But the cases he cites for this proposition—*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1152, footnote 2 and *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 298—do not support his proposition; instead, they apply when a court is evaluating the prejudicial impact of an incorrect jury instruction. Here, the instructions were correct.

Defendant's second argument starts from a valid premise. "[T]here must be a close connection between the [intended] crime aided and abetted and the offense actually committed." (*Prettyman*, *supra*, 14 Cal.4th at p. 269.) But his argument overlooks that when evaluating that connection, we do not "look to the naked elements of the target crime but must [instead]

consider the full factual context in which [the defendants] acted." (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 854 (*Canizalez*); *People v. Lucas* (1997) 55 Cal.App.4th 721, 732-733.) As explained above, the facts of this case indicate a sufficiently close connection between gang members' attempts to confront a rival and violence against anyone who disrespects them as they do so.

Defendant's last argument draws support from our Supreme Court's observation, in *Prettyman*, that "[m]urder . . . is *not* the 'natural and probable consequence' of 'trivial' activities." (*Prettyman*, *supra*, 14 Cal.4th at p. 269.) However, for these purposes, "triviality" has been defined expansively. Misdemeanors are not too trivial to lead to murder. (*Canizalez*, *supra*, 197 Cal.App.4th at p. 854 ["the label 'felony' or 'misdemeanor' . . . is not talismanic in deciding whether the aider and abettor can be convicted of a nontarget murder"].) Depending upon the facts of the case, the courts have held, murder *can* be a natural and probable consequence of a simple assault or of disturbing the peace (for fighting). (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 299-300 [simple assault]; *Montes*, *supra*, 74 Cal.App.4th at pp. 1054-1055 [simple assault and breach of the peace for fighting in public].) This was just such a case. As explained above, the People presented a gang expert's testimony that gang members often attack bystanders who disrespect them along with evidence that defendant himself struck a bystander because, in his own words, she "disrespected" him. This evidence was enough to send to the jury the question of whether the intended battery and disturbing the peace against the rival gang member could reasonably and probably lead to the attempted murder of the victims in this case.

*2. Failure to instruct the jury that it must find that defendant acted intentionally, deliberately and with premeditation*

In *People v. Favor* (2012) 54 Cal.4th 868, 879-880 (*Favor*), our Supreme Court held that a defendant who aided and abetted a robbery could be convicted of attempted premeditated murder as the natural and probable consequence of the robbery without any proof that the premeditated nature of the murder was foreseeable. "It is sufficient," the Court ruled, "that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed [by the actual perpetrator] willfully, deliberately and with premeditation." (*Id.* at p. 880.) A few years later, the Court in *Chiu*, held that a defendant could no longer be convicted of first degree premeditated murder under the judicially created natural and probable consequences doctrine. (*Chiu*, *supra*, 59 Cal.4th 155 at pp. 158-159, 165-166.)

Defendant argues that *Chiu*'s rule that the natural and probable consequences doctrine cannot support a conviction for premeditated *murder* applies with equal force to premeditated *attempted murder*, and effectively overruled *Favor*. Because *Favor* is no longer good law, defendant reasons, he can be convicted of attempted premeditated murder only if a jury specifically finds that he personally foresaw that an attempted murder would be committed intentionally, deliberately and with premeditation. Because there was no such jury finding in this case, defendant asserts that the life sentence imposed for attempted *premeditated* murder exceeds the statutory maximum authorized by section 664, subdivision (a), in violation of *Apprendi*, *supra*, 530 U.S. 466.

We reject both of defendant's arguments. To begin, we

decline defendant's invitation to invalidate *Favor*. The *Chiu* Court took pains to distinguish *Favor* and to reaffirm its continued validity. (*Chiu*, *supra*, 59 Cal.4th at p. 163.) It binds us. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

### *C. Response to jury note*

#### *1. Pertinent facts*

At the close of trial, the trial court instructed the jury on the natural and probable consequences doctrine using CALCRIM No. 403. That instruction informed the jury that it had to find that "[u]nder all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the attempted murder was a natural and probable consequence of the commission of the disturbance of the peace or battery." During deliberations, the jury sent a note requesting "an enlarged explanation" of the above-described language "to clarify meaning." With the consent of counsel, the court asked the jury foreperson what the jury "need[ed] clarified." The foreperson responded that the jury was looking for guidance on "whether or not this particular incident led to another." After excusing the foreperson, the court agreed with counsel that the jury was seeking to have the court "tell them the answer" to the question whether attempted murder was a natural and probable consequence of battery or disturbing the peace. With the consent of counsel, the court gave the following response to the jury note: "The instruction is the law and the court cannot expand on it."

#### *2. Analysis*

Defendant argues that the trial court's response to the jury note was an abdication of its continuing duty to properly instruct the jury on the law. (§ 1138 [if the jury "desire[s] to be informed

on any point of law arising in the case, . . . the information required must be given"]; *People v. Beardslee* (1991) 53 Cal.3d 68, 97.) Because a court is not "always" required to "elaborate on the standard instructions," a court has discretion in deciding whether and how to respond; we consequently review the trial court's handling of a jury note for an abuse of discretion. (*Beardslee*, at p. 97.)

In this case, the trial court did not abuse its discretion. Upon receiving the jury note, the court carefully conducted an inquiry into precisely what the jury wanted to know. That inquiry revealed that the jury was looking for the court to tell it "whether or not this particular incident led to another"—that is, the answer to the ultimate issue the jury was to decide. A court cannot tell a jury how to decide the issues before it. (E.g., *People v. Montero* (2007) 155 Cal.App.4th 1170, 1180.) Defendant suggests that the court should have restated the standard or quoted snippets from various cases, but doing so would not have been responsive to the jury's stated concern and would have risked either misstating the law (e.g., *Long v. Barbieri* (1932) 120 Cal.App. 207, 213 [noting dangers of instructing jury with "excerpts from . . . opinions"]), or being misinterpreted as an answer to the jury's concern—that is, how to decide one of the ultimate issues in the case. For these reasons, the court did not abuse its discretion when it declined to further instruct on the law and instead directed the jury that it had all the law the court could provide.

**D. *Relief under S.B. 1437***

S.B. 1437 retroactively amended the definition of "murder" to preclude a jury from "imput[ing]" "malice" "based solely on [a defendant's] participation in a crime." (§ 188, subd. (a)(3).) Our

Legislature's purpose was to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).)

Defendant asks us to vacate his attempted premeditated murder convictions, which, as noted above, rest on the theory that attempted murder was a natural and probable consequence of the crimes of battery and disturbing the peace that he aided and abetted. More specifically, he argues that (1) S.B. 1437 reaches attempted murder as well as "murder," and (2) this court is empowered to vacate his convictions because S.B. 1437's ameliorative provisions are presumptively retroactive to nonfinal convictions under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). The People respond S.B. 1437 created its own procedural mechanism—that is, section 1170.95—through which defendants can present their requests for retroactive relief, such that the proper remedy is to remand the case to the trial court to allow defendant to file a section 1170.95 petition in the first instance. This is an issue of statutory interpretation we review de novo. (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 234.)

We conclude that the enactment of S.B. 1437 does not empower us to vacate defendant's attempted premeditated murder convictions; instead, S.B. 1437 mandates a remand to the trial court to allow defendant to file a petition for relief under section 1170.95. Section 1170.95 authorizes defendants "convicted of . . . murder under a natural and probable consequences theory" to "file a petition" to vacate their murder

conviction based on S.B. 1437's change in law. (§ 1170.95, subd. (a)(3).) Where, as here, our Legislature has created a special statutory remedy for defendants to use in availing themselves of a retroactive change in the law, that procedure must be followed, and—notwithstanding *Estrada*—relief will not be granted on direct appeal of a conviction that is valid under the prior law. (*People v. DeHoyos* (2018) 4 Cal.5th 594, 603 (*DeHoyos*); *People v. Conley* (2016) 63 Cal.4th 646, 652. (*Conley*).) Our sister courts have uniformly applied this principle to S.B. 1437. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 727-729 (*Martinez*); *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1153-1157 (*Anthony*).)

Defendant resists this conclusion with four categories of arguments.

First, he argues that *Estrada* applies. He is wrong. In both *DeHoyos* and *Conley*, our Supreme Court explained that *Estrada*'s presumption of retroactivity (along with its empowerment of appellate courts to implement that retroactivity) is a gap filler meant applicable only when new legislation is "'silent on the question of retroactivity.'" (*DeHoyos*, *supra*, 4 Cal.5th at p. 602, quoting *Conley*, *supra*, 63 Cal.4th at p. 657.) By enacting section 1170.95 as part of S.B. 1437, our Legislature spoke.

Defendant goes on to offer several reasons why, in his view, S.B. 1437 is different from the statutes at issue in *DeHoyos* and *Conley*, and why *Martinez* and *Anthony* were wrong for not picking up on those differences. He argues that S.B. 1437's remedy—unlike the special statutory remedies at issue in *DeHoyos* and *Conley*—is not meant to be exclusive because (1) S.B. 1437's remedy says defendants "may" file a petition under the statutory remedy (§ 1170.95, subd. (a)) (rather than that they

"must do so"), and (2) S.B. 1437's remedy also provides that it "does not diminish or abrogate any rights or remedies otherwise available to the petitioner[-defendant]" (*id.*, subd. (f)). Neither of these grounds distinguishes *DeHoyos* or *Conley* because the remedies in those two cases had the same language. Defendant argues that S.B. 1437's remedy, unlike the special statutory remedies at issue in *DeHoyos* and *Conley*, does not disentitle a defendant to retroactive relief upon a finding by the trial court that the defendant poses an "unreasonable risk of danger to public safety." (§ 1170.18, subd. (b); 1170.126, subd. (f).) This is true, but irrelevant because S.B. 1437's special statutory remedy disentitles a defendant to retroactive relief upon a finding by the trial court that he personally "act[ed] with malice aforethought." (§ 188, subd. (a)(3).) All three statutes call for the development of further facts, a task to which trial courts are suited and appellate courts are not. Defendant argues that S.B. 1437—unlike the statutes at issue in *DeHoyos* and *Conley*—"concerns a change in the substantive law regarding homicide" rather than "a change in how certain crimes are classified." This is a false distinction, as the classification of a crime *is* part of the substantive law. Defendant argues that statements made in S.B. 1437's legislative history empower defendants to bypass section 1170.95. S.B. 1437's plain language is to the contrary and is controlling. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1151 ["courts must analyze a statute's plain language, and may look to the legislative history underlying a statute's enactment only if the plain language is ambiguous"].)

Second, defendant asserts that the additional delay occasioned by having to file a section 1170.95 petition warrants immediate relief. However, "nothing in" S.B. 1437 "indicates

[that our] Legislature intended that convicted defendants were entitled to immediate retroactive relief." (*Anthony*, *supra*, 32 Cal.App.5th at p. 1156; accord, *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 928 [so holding, as to Proposition 47's special petition procedure].)

Third, defendant contends that section 1170.95's procedure is unconstitutional because it empowers a trial court to make factual findings regarding his eligibility for relief under S.B. 1437 in derogation of his Sixth Amendment right to jury findings on all facts affecting his sentence under *Apprendi*, *supra*, 530 U.S. 466. We reject this contention for two reasons. To begin, our Supreme Court in *People v. Perez* (2018) 4 Cal.5th 1055, 1063-1064, ruled that retroactively ameliorative statutes like S.B. 1437 do not implicate a defendant's Sixth Amendment rights. Defendant's attempts to distinguish *Perez* on the ground that S.B. 1437 redefines the elements of "murder" is unpersuasive. Further, defendant's argument leads to an absurd result. If a trial court cannot make additional factual findings without violating *Apprendi*, neither could we; defendant's interpretation would mean that legislatures could not, when passing retroactive ameliorative legislation, prescribe *any* case-specific limits that would require additional factual findings. This is absurd.

Lastly, defendant urges that the rule of lenity requires us to credit his construction of S.B. 1437. Where, as here, a statute's text is clear, the rule of lenity does not apply. (Cf. *People v. Whitmer* (2014) 59 Cal.4th 733, 768-769 [rule of lenity applies when a statute is ambiguous].)

Accordingly, we affirm defendant's attempted murder convictions on appeal, but do so without prejudice to defendant filing a section 1170.95 petition in the trial court. The trial court

can, in the first instance, decide whether S.B. 1437 applies to attempted murder convictions and whether defendant otherwise qualifies for relief. Nothing in our discussion is intended to suggest any opinion on the merits of such a petition.

## II. Gang Enhancement

A defendant who commits a felony "for the benefit of, at the direction of, or in association with any criminal street gang" is subject to a variety of sentencing enhancements depending on the underlying crime. (§ 186.22.) For these purposes, a "criminal street gang" is defined as (1) an "ongoing organization, association, or group of three or more persons," (2) "having as one of its primary activities the commission of one or more of" several statutorily enumerated crimes, (3) "having a common name or common identifying sign or symbol," and (4) "whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity" (that is, two or more of its members have committed two or more statutorily enumerated offenses in the last three years). (§ 186.22, subds. (e) & (f).)

Defendant argues that (1) the gang enhancements as to all three crimes must be vacated due to insufficient evidence of the Bellflower Devils clique's "primary activities," and (2) the gang enhancement as to the robbery must be vacated because it was a crime he committed on his own and was in no way for the benefit of, at the direction of, or in association with his gang. We review these claims for substantial evidence. (*Banks*, *supra*, 59 Cal.4th at p. 1156.)

### *A. Primary activities*

For the commission of qualifying crimes to be one of a gang's "primary activities," the commission of those crimes must be "one of the group's 'chief' or 'principal' occupations." (*People v.*

*Sengpadychith* (2001) 26 Cal.4th 316, 323.) Put differently, the People must prove that the gang's members "*consistently and repeatedly*" commit those crimes. (*Id.* at p. 324.) There are many ways to prove that a gang's commission of qualifying crimes is one of its "primary activities": (1) the People can prove that individual gang members have consistently and repeatedly committed qualifying crimes, and the tally may include the defendant's commission of the charged offenses (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224-1226 [commission of three crimes by a small gang during a three-month period; sufficient]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457; cf. *In re Jorge G.* (2004) 117 Cal.App.4th 931, 944-946 [commission of a single crime; insufficient]; *People v. Perez* (2004) 118 Cal.App.4th 151, 160 [commission of three qualifying crimes, including the charged crime, within one week as well as another qualifying crime six years earlier; insufficient]); (2) a gang expert can offer an opinion on the gang's primary activities (*People v. Gardeley* (1996) 14 Cal.4th 605, 620, overruled on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*); *Sengpadychith*, at p. 324; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330); or (3) the People can prove that the gang's primary purpose is to instill fear and to intimidate, and that gang members have committed qualifying crimes to create such fear and intimidation (*Duran*, at p. 1465).

In this case, there is ample evidence that the Bellflower Devils clique's primary activities were the commission of statutorily enumerated crimes. The People's expert testified that the clique's primary activities "range from theft, vandalism, grand theft auto, sales of narcotics, possession of weapons, possession of firearms, witness intimidation, arson, assault,

assault with deadly weapons, and all the way up to murder." Nearly all of these crimes are qualifying felonies. (§ 186.22, subd. (e)(9), (10), (25) [grand theft, grand theft auto, and unlawful taking of a vehicle], (20) [felony vandalism], (4) [sale and possession for sale of narcotics], (8) [witness intimidation], (23), (31), (32), (33) [possession of firearms and concealed firearms], (7) [arson], (1) [assault with a deadly weapon], (3) [homicide].) This opinion went unchallenged. The People also introduced evidence that Bellflower Devils clique members committed five statutorily enumerated crimes in a three-year period—a 2010 attempted murder, a 2010 assault with a deadly weapon, and the two attempted murders and the robbery committed in 2012 in this very case. (§ 186.22, subd. (e)(1) [assault with a deadly weapon], (2) [robbery], (3) [homicide].)

Defendant responds with two arguments. Citing *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, he asserts that the expert's opinion lacked a sufficient foundation. However, the court in *Nathaniel C.* found fault with an expert's testimony because it repeated "nonspecific hearsay of a suspected shooting" of which the expert had no personal knowledge. (*Id.* at pp. 1003-1004.) Here, the expert relied upon his personal knowledge of the Bellflower Devils clique of the 18th Street gang, a gang with which he was familiar. His opinion was further corroborated by properly admitted conviction documents regarding the two 2010 crimes as well as the evidence admitted as to the 2012 attempted murders and robbery charged in this case. Defendant further argues that the expert's testimony ran afoul of *U.S. v. Mejia* (2d Cir. 2008) 545 F.3d 179, 190-191, which prohibits experts from offering case-specific opinions. Our Supreme Court has rejected *Mejia*'s rule. (*Sanchez*, *supra*, 63 Cal.4th at p. 676 [experts may

"give an opinion about what [case-specific] facts may mean"].)

***B. Robbery***

To prove the fact that a crime was committed "for the benefit of, at the direction of, or in association with" a gang, it is not enough to show that the defendant was a gang member. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1195-1196; *People v. Ramon* (2009) 175 Cal.App.4th 843, 853.)

Here, the sole evidence connecting defendant's robbery at the Rite Aid with the gang was his membership in the Bellflower Devils clique. The People's gang expert offered no testimony regarding the robbery, and there was no evidence that defendant called out his gang's name or otherwise did or said anything during the robbery to indicate it was associated with the gang, rather than a crime he committed for his own benefit.

On appeal, the People suggest that there was enough evidence because the Rite Aid was located within 18th Street gang territory. Defendant also had visible gang tattoos on his face during the robbery, as they were there during the shootings the month before. But this is insufficient to connect the robbery to the gang. The commission of a crime within gang territory is not enough, by itself, to forge the necessary link. And there was no evidence that the loss prevention officer recognized defendant's tattoos as gang-related. On this record, there was insufficient evidence that the robbery was for the benefit of, at the direction of, or in association with a gang. The enhancement for the robbery count must accordingly be vacated.

**III. Personal Infliction of Great Bodily Injury Enhancement**

Defendant argues, and the People concede, that there is insufficient evidence to support the jury's finding that he personally inflicted great bodily injury on the two victims Itehua

shot. We agree, and order that this enhancement be vacated. This does not affect the length of defendant's sentence.

**DISPOSITION**

The personal infliction of great bodily injury finding is vacated. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P.J.
ASHMANN-GERST

_____, J.
CHAVEZ